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Southern District of New York  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA,

Plaintiff,

v.

APOLLO THEATER FOUNDATION,

Defendant.  
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: CONSENT DECREE  
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: 05 Civ. 5988 (HB)  
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: ECF CASE  
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WHEREAS, Plaintiff United States of America (the "Government") commenced this action to enforce provisions of the Americans with Disabilities Act of 1990 ("ADA") against defendant the Apollo Theater Foundation (the "Foundation" or "Defendant"), pursuant to 42 U.S.C. § 12188(b)(1)(B), with respect to the Apollo Theater, a theater or other place of exhibition or entertainment, located at 235 West 125th Street, New York (the "Theater"); and

WHEREAS, the complaint alleges that Defendant violated Title III of the ADA, 42 U.S.C. §§ 12181-89, and the Department of Justice's implementing regulation, 28 C.F.R. Pt. 36, by, among other things, failing to remove architectural barriers to access where it is readily achievable to do so; failing to use readily achievable alternatives to barrier removal where barrier

removal is not readily achievable; and failing to make reasonable modifications to policies, practices and procedures to make the goods and services offered at the Theater accessible to individuals with disabilities; and

WHEREAS, the commencement of this action by the Government follows an investigation by the United States Attorney's Office for the Southern District of New York into a complaint alleging that the Theater violated the ADA; and

WHEREAS, Defendant has consented to the entry of this Consent Decree without trial or adjudication of any issues of fact or law and without this Consent Decree constituting an admission by defendant with respect to any such issues; and

WHEREAS, the Government and Defendant agree that settlement of these matters without further litigation is in the public interest and that the entry of this Consent Decree is the most appropriate means of resolving these matters;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

#### **JURISDICTION AND VENUE**

1. This Court has jurisdiction over this action pursuant to 42 U.S.C. §§ 12188(b)(1)(B) and 42 U.S.C. §§ 1331 and 1345.

#### **APPLICATION AND PARTIES BOUND**

2. This Consent Decree applies to, and is binding upon, the Government and the Defendant. This agreement shall be binding on Defendant, its agents and employees. In the event Defendant seeks to transfer or assign all or part of its interest in any facility covered by this agreement, and the successor or assign intends on carrying on the same or similar use of the facility, as a condition of sale Defendant shall obtain the written accession of the successor or

assign to any obligations remaining under this agreement for the remaining term of this agreement. The undersigned representative of Defendant certifies that she is authorized by Defendant to enter into and consent to the terms and conditions of the Consent Decree and to execute and legally bind Defendant to it.

3. The Theater is a place of public accommodation within the meaning of 42 U.S.C. § 12181(7) because it is a “theater, . . . or other place of exhibition or entertainment” within the meaning of 42 U.S.C. § 12181(7)(C) and 28 C.F.R. § 36.104. The Foundation operates a place of public accommodation as defined in 42 U.S.C. § 12181 and 28 C.F.R. § 36.104.

#### **FACILITY COVERED BY THIS CONSENT DECREE**

4. This Consent Decree shall apply to the theater facilities at the Apollo Theater, at 235 West 125th Street, New York, New York. Notwithstanding any term of this Consent Decree, specifically reserved and excluded from the scope and terms of this Consent Decree as to any entity or person, including the Government, is any claim arising under the ADA and the Department of Justice regulations implementing the ADA pertaining to the below stage, below or above-stage dressing and wardrobe rooms, security and other offices, toilet facilities in these areas, and the routes to and connecting these areas. Similarly reserved and excluded are the bar and concession stands.

#### **INJUNCTIVE RELIEF**

#### **BARRIERS TO ACCESS**

5. During the course of its investigation of the Theater, the Government identified a number of barriers to access to and within the Theater, which are described more fully below. Defendant shall remedy the barriers to access identified in this Consent Decree in the manner set

forth below within nine months after the date of entry of this Consent Decree. In addition, any renovations or alterations to the Theater commenced on or after October 1, 2003, including without limitation the addition of any new seating, bar or food concessions or facility, restaurant, function room, restroom, drinking fountain, or public telephone, shall be made in accordance with the ADA Accessibility Guidelines for Buildings and Facilities, 28 C.F.R. Pt. 36, App. A (the "Standards").

### **DESIGNATED WHEELCHAIR AND COMPANION SEATING**

6. Barrier Description. The Theater has a seating capacity of 1,464 people. The Theater lacked the required number of wheelchair seating locations accompanied by companion seats. See Standards § 4.1.3(19). To the extent that it is readily achievable, these seats shall be dispersed and shall provide comparable lines of sight and be offered at comparable ticket prices. 28 C.F.R. §§ 36.308(a)(I)(A), 36.308(a)(ii)(B). The Standards also require that one fixed designated companion seat be provided next to each wheelchair seat. See Standards § 4.33.3.

7. Consent Decree Requirement. Defendant shall implement the Proposed Seating Plan for Accessibility, a copy of which is annexed hereto as Exhibit A ("Proposed Plan"). Defendant agrees, voluntarily, to make all accessible seating for people with physical disabilities, regardless of location, available at the lowest ticket price. Defendant shall make tickets available for sale to individuals with disabilities at the same times and conditions as those for sale to the general public.

Defendant further agrees that before commencing any alteration to the seating area, Defendant shall provide the Government with a Revised Proposed Seating Plan for Accessibility

("Revised Plan"), which shall not contain fewer accessible seating locations than those designated in the Proposed Plan, and shall otherwise comply with the ADA Standards, unless Defendant can show that to do so would be "technically infeasible" as defined in Section 4.1.6(1). Defendant shall obtain the Government's approval, which shall not be unreasonably withheld, before commencing any renovation pursuant to the Revised Plan.

### **AISLE TRANSFER SEATING**

8. Barrier Description. The Theater lacked a sufficient number of seats adjoining an aisle equipped with removable or folding armrests on the aisle side of the chair, or without armrests on that side. See Standards § 4.1.3(19).

9. Consent Decree Requirement. Defendant shall implement the Proposed Plan. Defendant agrees, voluntarily, to make all accessible seating for people with physical disabilities, regardless of location, available at the lowest ticket price. Defendant shall make tickets available for sale to individuals with disabilities at the same times and conditions as those for sale to the general public.

Defendant further agrees that before commencing any renovation of the seating area, Defendant shall provide the Government with the Revised Plan, which shall not contain fewer seats adjoining an aisle equipped with removable or folding armrests on the aisle side of the chair, or without armrests on that side than those designated in the Proposed Plan, and shall otherwise comply with the ADA Standards. Defendant shall obtain the Government's approval, which shall not be unreasonably withheld, before commencing any alteration pursuant to the Revised Plan.

## ACCESSIBLE RESTROOM FACILITIES

### 10. Barrier Description:

a. Both Restrooms. The existing doors to the restrooms had inaccessible door controls, specifically knobs. See Standards § 4.13.9. The restroom signage was located on the door and was inaccessible, in that it lacked raised characters or Braille. See Standards § 4.30.1. The restroom doors lacked the required latch side maneuvering space for approach and access. See Standards § 4.13.6. The restrooms had a fascia that was too low, at 23 inches, which blocked forward approach to the fixtures. See Standards § 4.19.2. The existing fixtures lacked pipe protection. See Standards § 4.19.4.

b. Men's Room. The stall in which grab bars had been installed lacked the space required for an accessible stall. See Standards § 4.17.3. The stall door had an inaccessible twist latch. See Standards § 4.17.5. The stall door stood open and did not self-close for privacy. See Standards § 4.17.5. The existing parallel stall was too wide, at 37 inches. See Standards Fig. 30(b). The urinal was 24 inches above the finished floor and lacked an elongated rim. See Standards § 4.18.2.

c. Women's Room. The stall in which grab bars were installed lacked the space required for an accessible stall. See Standards § 4.17.3. The stall door had an inaccessible twist latch. See Standards § 4.17.5. The stall door stood open and was not self-closing for privacy. See Standards § 4.17.5. The existing parallel stall was too wide, at 37 inches. See Standards Fig. 30(b).

11. Consent Decree Requirement. Defendant shall eliminate all barriers to accessibility identified in paragraphs 10(a) - (c), and comply with the Standards identified in paragraphs 10(a) - (c). In addition, Defendant shall install a unisex restroom consistent with the Unisex Restroom Plan annexed hereto as Exhibit B. See Standards § 4.17.3. Defendant shall install signage for the unisex restroom in compliance with Standards § 4.30.

### **EXTERIOR ACCESSIBLE ROUTES**

12. Barrier Description:

- a. Entrance From 125th Street: The entrance to the Theater was sloped and lacked a level landing for approach to the door. See Standards § 4.13.6.
- b. Entrance From 126th Street: The Theater lacked an accessible route from the rear entrance to the Theater from 126th Street. The exit doors have high thresholds of 1½ inches above the finished floor. See Standards § 4.13.8.

13. Consent Decree Requirement. Defendant shall implement the 125th Street Front Entrance Plan, annexed hereto as Exhibit C, for the front entrance of the Theater at 125th Street. Defendant shall implement the 126th Street Rear Entrance Plan, annexed hereto as Exhibit D, for the rear entrance of the Theater at 126th Street. Defendant shall install signage for the rear entrance route in compliance with Standards §§ 4.30.4, 4.30.5, and 4.30.6.

## **ELEVATOR FACILITIES**

14. **Barrier Description.** The existing elevator did not provide self-leveling at each floor. See Standards § 4.10.2. The elevator lacked accessible controls in the cab panel. See Standards § 4.10.12. The elevator lacked appropriate signage. See Standards § 4.30.4. The jamb floor indicators lacked raised and Braille characters at each floor. See Standards § 4.10.5.

15. **Consent Decree Requirement.** Defendant shall eliminate the barriers to accessibility identified in paragraph 14 and comply with the Standards identified in paragraph 14.

## **PUBLIC TELEPHONES**

16. **Barrier Description.** The public telephones had controls and coin slots that were above the reach range at 60 inches. See Standards § 4.31.3. The units lacked volume controls for a user with a hearing disability. See Standards § 4.31.5. The telephones lacked a fixed TTY or the appropriate shelf and outlet for a portable unit provided by the Theater. See Standards §§ 4.1.3(17)(a) and (d); 4.31.9.

17. **Consent Decree Requirement.** Defendant shall eliminate the barriers to accessibility identified in paragraph 16 and comply with the Standards identified in paragraph 16.

## **DRINKING FOUNTAINS**

18. **Barrier Description.** The drinking fountains were blocked by stored material and lacked the required clear floor space for approach and access. See Standards § 4.16.2.



19. Consent Decree Requirement. Defendant shall eliminate the barriers to accessibility identified in paragraph 18 and comply with the Standards identified in paragraph 18.

### **ALARM SYSTEMS**

20. Barrier Description. There was no accessible fire alarm system. See Standards §§ 4.27, 4.28.1.

21. Consent Decree Requirement. Within eighteen months of the date of entry of this Consent Decree, Defendant shall lower the pull boxes, use a loud speaker associated with the stage panel fire alarm system for alarm announcements, and install a system of flashing lights for patrons with hearing impairments, in accordance with the Standards identified in paragraph 20.

### **TICKET RELEASE POLICY**

22. Consent Decree Requirement: Defendant shall give first preference for all wheelchair and companion seating locations to persons who specifically request them for disability-related reasons. Accessible seating shall be the last seating to be sold.

(a) At least four accessible seating locations shall be reserved, until the day of the performance, for sale to persons who specifically request them for disability-related reasons. Defendant shall not release these accessible seating locations for sale to patrons who do not request accessible seating locations until the day of the performance.

(b) Defendant shall not release any other unsold accessible seating locations for sale to patrons who do not request accessible seating locations until the earlier of two weeks after the performance is sold out, or seventy-two hours before the performance.

23. Defendant shall ensure that persons who specifically request wheelchair and companion seating for disability-related purposes through the Theater's box office are informed of all of the available seating that has not been sold at that time. Defendant shall use its best efforts to ensure that persons who specifically request wheelchair and companion seating for disability-related purposes through other ticket distribution methods, such as Ticketmaster, are informed of all of the available seating that has not been sold at that time and are provided with their first stated choice of available seating locations, and are not otherwise encouraged or steered to sit elsewhere.

#### **SERVICES, BENEFITS, ADVANTAGES, AND PRIVILEGES**

24. Defendant is enjoined from discriminating against individuals on the basis of disability in the full and equal enjoyment of the goods and services of the Theater. Defendant shall provide individuals with disabilities an equal opportunity to benefit from the goods, services, benefits, advantages, and privileges as is provided to those individuals without disabilities.

#### **PENALTIES AND DAMAGES**

25. Defendant shall pay a total of one thousand dollars (\$1,000.00) in full and final settlement and satisfaction of any and all claims asserted by the Government in this action for civil penalties. Payment of this amount shall be made within thirty days after the date of entry of this Consent Decree by wire transfer to the United States Department of Justice, with transfer

instructions to be provided by undersigned Government counsel. Defendant agrees to pay the amount specified in this paragraph to resolve this matter without costly and protracted litigation.

### **CERTIFICATION**

26. Within fifteen months after the date of entry of this Consent Decree, Defendant shall submit to the Government and file with the Court a certification, under penalty of perjury, stating that it has complied with all obligations of this Consent Decree that are required to be satisfied or completed by that date, and shall state specifically that (a) the Proposed Plan required to be installed by paragraphs 7 and 9 of this Consent Decree has been installed; (b) the Unisex Restroom required to be installed by paragraph 11 has been installed; (c) the power-assisted front door required to be installed by paragraph 13 has been installed; (d) the rear door slope required to be installed by paragraph 13 has been installed; and (e) the modifications required by paragraphs 15, 17, 19, and 21 have been completed. Within thirty days after the date of completion of any alteration pursuant to a Revised Plan under paragraphs 7 and 9, Defendant shall submit to the Government a certification, under penalty of perjury, stating that it has complied with all obligations of this Consent Decree as to the Revised Plan under paragraphs 7 and 9.

### **RIGHT TO REVIEW COMPLIANCE**

27. Upon reasonable advance notice to Defendant (through undersigned counsel), Defendant shall permit the Government and any person acting on its behalf unrestricted access to the Theater to review compliance with the ADA and this Consent Decree. If the Government

believes that Defendant has violated this Consent Decree or is otherwise not in full compliance with the ADA, the United States will notify Defendant in writing and seek to resolve the matter amicably before applying to the Court for relief. For two years from the effective date of this Consent Decree, Defendants shall provide to the Government (every 120 days) a report on the sales of wheelchair, aisle transfer, and companion seating locations, specifying the seat(s) requested and the seat(s) sold, including the timing of such sales, and sales through Ticketmaster.

### **VIOLATION OF THIS CONSENT DECREE**

28. A violation of this Consent Decree shall be deemed a subsequent violation of the ADA under 42 U.S.C. § 12188(b)(3); 28 C.F.R. § 36.504(b).

### **RESERVATION OF RIGHTS**

29. Nothing contained in this Consent Decree is intended or shall be construed as a waiver by the Government of any right to institute any proceeding or action against Defendant for violations of any statutes, rules or regulations administered by the Government, or to prevent or limit the rights of the Government to obtain relief under the ADA, or any other federal statutes or regulations, or on account of any violation of this Consent Decree or any other provision of law. However, subject to Defendant's full compliance with the Consent Decree, the Government will not file a subsequent complaint against Defendant pursuant to Title III of the ADA concerning the Theater covered by this Consent Decree for the same violations identified in the complaint herein, unless Defendant makes alterations that do not comply with Title III of the ADA. This Consent Decree is a compromise of claims between the Government and Defendant. It is based

on the unique nature of this particular facility and its provisions are not necessarily applicable to any other entities or facilities.

### **MODIFICATION**

30. There shall be no modification of this Consent Decree without the written consent of the Government, Defendant, and the approval of the Court.

### **ENTIRE AGREEMENT**

31. This Consent Decree represents the entire agreement between the Government and Defendant. No prior agreements, oral representations or statements shall be considered part of this Consent Decree.

### **RETENTION OF JURISDICTION**

32. This Court shall retain jurisdiction of this action for a period of three (3) years from the date of the latest certification required by paragraph 27 of this Consent Decree, to enforce or modify the provisions of this Consent Decree, to resolve any dispute that arises under this Consent Decree, and to entertain any application and issue any orders (including, without limitation, orders directing the modification of policies, practices, and procedures, and orders requiring the removal of barriers to access) as may be necessary or appropriate for the effectuation of its terms. The parties shall discuss and attempt to negotiate a resolution of any dispute relating to the interpretation of this Consent Decree before bringing the matter to the Court's attention for resolution.

### **EXECUTION OF CONSENT DECREE**

33. This Consent Decree may be executed in counterparts, each of which shall be an original and shall constitute one and the same instrument.

### **INCORPORATION OF EXHIBITS**

34. Exhibits A , B, C, and D to this Consent Decree are incorporated by reference into this Consent Decree and the terms set forth on those exhibits are part of this Consent Decree as though fully set forth in the Decree.

### **COSTS AND ATTORNEY'S FEES**

35. Each party shall bear its own costs and attorney's fees in this action.

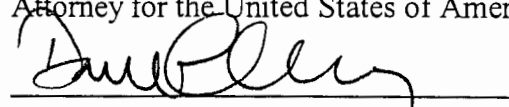
THE PARTIES HEREBY CONSENT to entry of the foregoing Consent Decree:

FOR THE UNITED STATES:

Dated: New York, New York  
June 28, 2005

DAVID N. KELLEY  
United States Attorney for the  
Southern District of New York  
Attorney for the United States of America

By:

  
DAVID J. KENNEDY (DK-8307)  
Assistant United States Attorney  
86 Chambers Street -- 3rd Floor  
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Tel. No.: (212) 637-2733

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FOR DEFENDANT:

Dated: New York, New York  
June 24, 2005

PAUL, HASTINGS, JANOFSKY & WALKER LLP

Attorney for Defendant

By:



CHARLES J. HAMILTON, JR. (CH- )

75 East 55th Street

New York, New York 10022

Tel. No.: (212) 318-6000 / 318-6680

Fax No.: (212) 230-7894 7627

SO ORDERED:



UNITED STATES DISTRICT JUDGE

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